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OGC REVIEW COMPLETED

9 March 1949

MEMORANDUM FOR: PERSONNEL BRANCH
TRANSACTIONS AND RECORDS

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SUBJECT:

Appointment of [redacted]

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1. We have previously discussed the case of [redacted] with the administrative officers of OPC. On looking into the law on the matter, it appears that the situation is covered by the decision in 26 Comp. Gen. 501, as clarified by the recent opinion of the Comptroller General of the United States, No. B-80106, dated December 29, 1948. In clarifying his earlier decision in 26 Comp. Gen. 501, the Comptroller stated:

"Rather, said holding was based upon the proposition that where the nature of the duties required is purely advisory, generally performed at infrequent intervals, and the compensation payable therefor is upon a fee basis, as distinguished from a purely time basis, the status of the employee is not such as would constitute the holding of an office or position within contemplation of section 212. No particular one of the enumerated elements is considered as determinative of the matter. On the contrary, the absence of any one of such elements is sufficient to take a particular case out of the rule enunciated in that decision."

2. The situation is further clarified by the distinction made in decision No. B-80106. There a retired officer, who was employed at the rate of \$40 per day when actually working, with proportionate deductions from such compensation when not required to work full days, the Comptroller said it was clear that he was working on a time basis as distinguished from a fee basis and, therefore, he is not covered by the holding in 26 Comp. Gen. 501, and his retirement pay withheld for each day worked. We have discussed this opinion with the GAO auditor who audits the CIA accounts, and he has indicated his agreement with our opinion that if the conditions set forth by the Comptroller are strictly complied with, there would be no

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need to withhold the retirement pay of [redacted]

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3. We have discussed these conditions with the officers of OPC, as stated above, and they assure us that the plans for [redacted] meet the situation. That (1) the nature of his duties will be purely advisory and he will have no administrative or operational functions; (2) they will be performed at infrequent intervals at not more often than two days in one week; and (3) compensation is to be payable on a fee basis, i.e., at a flat rate for each day on which advisory duties are performed without regard to the time of performance within any such day. In view of the above, we feel there is no objection to issuing a personal service contract, authorizing the proposed fee under the above conditions, as it appears clear that [redacted] will not hold an office or position within the contemplation of Section 212 of the Economy Act, 5 U.S.C. 59a.

STATINTL

4. Note that in 26 Comp. Gen. 501, the Comptroller specifically rules that the engaging of services as consultant by contract, or otherwise, upon a fee basis, is not an appointment to an office to which compensation is attached within the meaning of those words as used in the Act of July 31, 1894, 5 U.S.C. 62, which appears to be the only other provision of law involved in the immediate case.

LAWRENCE R. HOUSTON
General Counsel

LRH/mll

cc: Chrono
Central Records
✓Subject
Legal Decisions

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